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TAKING WOMEN'S RIGHTS SERIOUSLY: THE CASE OF COMMONS

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Abstract

Most people living in rural areas in the Global South depend on 'commons' such as forests, grazing lands and fisheries to meet their basic needs. Yet the commons remain largely unrecognised and vulnerable to commodification, which risks depriving rural and indigenous people from their access to food and essential resources. Enclosure of the commons is not gender-neutral. Women – as the primary exploiters of the commons – thus suffer from the insecurity of these natural resources. Land-grabbing policies and expropriation of the commons have further impoverished women and diminished their control over communal lands and natural resources. In order to resist further gender-based discrimination in the commodification of the commons, this contribution asks whether women's rights, as enshrined in international conventions such as the Convention on the Elimination of All Forms of Discrimination against Women, can indeed be part of the solution. It argues that while most development actors like the World Bank still promote privatisation strategies leading to the dispossession of women in developing countries, women's rights recognise autonomous management and governance mechanisms of communal land and natural resources. Indeed, States are required to protect women's rights, businesses are responsible to prevent violations in their operations and throughout their supply chains, and communities must endeavour to eliminate gender discrimination internally. The purpose of this contribution is therefore to take a gender approach to the human rights protection of the commons in developing countries. We argue that women's rights can serve as a potential instrument in the struggle for reclaiming the commons in the Global South.

Keywords

Commons; community lands; natural resources; enclosure; development; gender; women's rights

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1. INTRODUCTION	4
2. COMMONS.....	5
3. COMMONS AND GENDER	7
4. WOMEN’S RIGHTS	11
4.1. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN.....	11
4.2. RIGHTS OF INDIGENOUS WOMEN	12
4.3. RIGHTS OF PEASANT WOMEN	13
4.4. VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY	15
4.5. BUSINESS AND HUMAN RIGHTS.....	17
5. CONCLUSION	20

1. INTRODUCTION

Most people in rural areas in the Global South depend on ‘commons’ such as forests, grazing lands and fisheries to meet their basic needs. Such commons are not controlled by a public authority (the State), nor are they managed by private individuals (or other individual legal entities) within a set of well-defined property rights (the market). The work of the 2009 Nobel Prize for Economic Sciences, Elinor Ostrom, characterised the commons as bottom-up community governance mechanisms for common-pool resources (CPRs).¹ Recognition of the right to self-organisation and access to the commons is vital for many communities across the world to ensure a decent standard of livelihood. However, according to a report led by a coalition of NGOs, indigenous and communal lands make up over 50 percent of the earth’s area, yet the 2.5 billion people depending on them only legally own one fifth.² As the rest is unrecognised or not treated as full property, it is vulnerable to commodification, which risks depriving rural and indigenous people in the Global South from their access to food and essential resources. Under the increased pressure on land and scarce natural resources, forest dwellers, fishers and pastoralists are also facing the threat of being fenced off from grounds that their community used for generations. Examples are abundant, such as concessions for mining in Peru or Colombia,³ the privatisation of water cooperatives in Bolivia,⁴ and large-scale land grabs in Africa,⁵ which all disrupt the communal system of existence of local communities.

This contribution takes a new stimulating gender-based perspective to the debate around the legal protection of commons against enclosure. Women are indeed disproportionately affected by this new wave of enclosure of commons, and yet the challenges they face are too often overlooked in the literature. This contribution posits as a premise that the enclosure of commons is not gender-neutral. Women – as the primary exploiters of the commons – suffer from the insecurity of these community lands and other shared natural resources, as they increasingly become the target of investments and development projects. Land-grabbing policies and expropriation of the commons have further impoverished women and diminished their control over communal lands and natural resources, such as water, forests, fuelwood and fisheries.

This contribution seeks to provide a broad starting point to connect gender with the international human rights protection of the commons in developing countries. While recognising the great diversity of commons and experiences of women across the world, it takes a global and generic approach – concrete examples are used to illustrate how women’s rights may be abused. In light thereof, it is structured in four parts. First, it defines, based on Elinor Ostrom’s trailblazing work, the increasingly popular concept of the commons as a social system distinct from traditional public or private arrangements. It then brings gender into the already bleak picture of dispossession of the commons at the various State, market and

¹ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).

² Oxfam, International Land Coalition, Rights and Resources Initiative, *Common Ground. Securing Land Rights and Safeguarding the Earth* (Oxford: Oxfam, 2016), 39.

³ César Padilla, ‘Mining as a Threat to the Commons: The Case of South America’, in David Bollier and Silke Helfrich, *The Wealth of the Commons: A World Beyond Market & State* (Amherst, MA: Levellers Press, 2012).

⁴ Manuel de la Fuente, ‘A Personal View: The Water War in Cochabamba, Bolivia: Privatization Triggers an Uprising’, *Mountain Research and Development* 23, no. 1 (2003), 98.

⁵ Pauline E. Peters, ‘Conflicts over Land and Threats to Customary Tenure in Africa’, *African Affairs* 112, no. 449 (2013), 543.

community levels: how is gender relevant and which challenges do women face in the governance of the commons? Finally, it asks whether women's rights, as enshrined in international and regional human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), can be part of the solution. By relying on recent commentaries of human rights monitoring bodies as well as official documents of international development institutions, this contribution shows that women's rights do recognise and protect the equal role of women with men in the autonomous management and governance mechanisms of communal land and natural resources. Women's rights can therefore serve as a potential instrument in the struggle for reclaiming the commons in the Global South. It concludes that States, development actors and communities should all take women's rights seriously.

2. COMMONS

To define the term 'commons', it is usual to resort to the basic economic classification of goods. Unlike public goods, which are non-rival, CPRs such as sea fish stocks or clean water are rival in consumption, which means that if one person consumes a given good, others cannot enjoy it anymore. CPRs are therefore highly vulnerable for depletion. In his famous contribution 'The Tragedy of the Commons' (1968), the American scientist Garrett Hardin describes an economic model devoid of any empirical evidence but based on rational choice theory, in which individual actors automatically tend to over-exploit and plunder CPRs that are freely available to everyone.⁶ Hardin illustrates this with the example of an open-access pasture on which self-interested herders use as much grass as possible to rear their cattle. Consequently, the inevitable result is the degradation and depletion of what he mistakenly calls 'the commons'. According to Hardin, '[f]reedom in a commons brings ruin to all'.⁷ To avoid the unconstrained over-exploitation of natural resources by selfish individuals, Hardin only believes in two possible coercive arrangements: the enclosure of resources through private property, or, if this fails, public regulation.⁸ Even though he admits that the legal institution of private property is 'unjust', he claims that there is no 'better system': '[t]he alternative of the commons is too horrifying to contemplate'.⁹

Despite the influence of Hardin's parable,¹⁰ the story does not stop there. In *Governing the Commons* (1990), the 2009 Nobel prize in economics Elinor Ostrom shows through various case studies how local communities can develop autonomous institutions with their own *ad hoc* rules to govern CPRs such as groundwater and forests.¹¹ She demonstrates that the communities themselves can in fact sustainably manage shared natural resources. In her book, which quickly became the standard reference in the study of the commons, Ostrom examines the factors that lead self-governance mechanisms to succeed. Despite the wide diversity of arrangements, she identifies eight 'design principles' for commons-based institutions to be sustainable in the long term, including clearly defined boundaries, monitoring

⁶ Garrett Hardin, 'The tragedy of the commons', *Science* 162, (1968), 1243.

⁷ *Ibid.*, 1244.

⁸ *Ibid.*, 1247.

⁹ *Ibid.*

¹⁰ See for a recent and critical account of the popularity of Garrett Hardin's narrative: Surabhi Ranganathan, 'Global Commons', *European Journal of International Law* 27, no. 3 (2016), 693.

¹¹ Ostrom, *Governing the Commons*.

mechanisms, graduated sanctions, and appropriators' rights to devise their own institutions.¹² In other words, commons are not 'no-law' zones owned by 'anybody' where resources are allocated on a 'first-come, first-served' basis. Instead, in documenting examples in Kenya, Guatemala or Nepal where communities effectively cooperate to protect their shared resources from depletion for the needs of future generations, Ostrom shows that the commons amount to a fully-fledged management mechanism of natural resources. In exploring the empirical realities behind the management of CPRs, she rebutes Hardin's assumption that commons equate to open access regimes. She proves that it is possible to prevent commons from collapsing through institutions that are neither 'all-private', nor 'all-public', but collectively owned.

Now it should be acknowledged that, since then, Ostrom's design principles have been applied in very different contexts, across a wide range of disciplines involving economics, law, history, sociology, going beyond the sole issue of natural resource management. Over the last years, grassroots social movements have also embraced the commons as a new governance model to rethink the traditional public-private divide, and to prioritise ecological and human needs of communities over market and State. An increasing number of authors nowadays identify the commons with political strategies of resistance, such as the commons movement in Italy (the Rodotà Commission that introduced into the Italian Civil Code a third category of *beni comuni* beyond the public/private goods, the 2011 Water Constitutional Referendum), the *indignados* in Spain or the Occupy movement in the USA to overcome the extractive force of capitalism and the top-down logic of States.¹³ As a result, commons are today more closely connected with the social practice of '*commoning*', and with the collective self-governance mechanisms they imply, than with the strict category of economic goods they used to refer to in the past.¹⁴

In other words, commons cannot be abstracted from the social networks which participate in their production and protection: without communities, there will be no commons. This is why we do not simply speak of 'common goods' in this contribution, but of commons. Despite the wide diversity among all kinds of commons across the world (from an indigenous communal forestry in Peru¹⁵ to a water cooperative in Kinshasa¹⁶ or in La Paz¹⁷), these arrangements are usually defined as social systems consisting of three elements:

- (i) A common-pool *resource*, be it a tangible resource like pastures, lands, seeds, forests or water reserves, or even an intangible resource such as traditional knowledge or the Internet (the object);

¹² Ibid., 90.

¹³ See Massimo De Angelis, *Omnia Sunt Communia: On the Commons and the Transformation to Postcapitalism* (London and New York: Zed Books, 2017); David Bollier and Silke Helfrich, *Patterns of Commoning* (Amherst, MA: Levellers Press, 2015); David Bollier and Silke Helfrich, *The Wealth of the Commons: A World Beyond Market & State* (Amherst, MA: Levellers Press, 2012).

¹⁴ To clear up the 'terminological fuzziness' under the term 'commons', see Tine De Moor, 'From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons', *Natures Sciences Société* 19, no. 4 (2011), 422.

¹⁵ Maria Rosaria Marella, 'The Commons as a Legal Concept', *Law Critique* 28 (2016), 66.

¹⁶ Christopher E. Morrow and Rebecca W. Hull, 'Donor-Initiated Common Pool Resource Institutions: The Case of the Yanesha Forestry Cooperative', *World Development* 24, no. 10 (1996), 1641.

¹⁷ Sarah Boton, Sébastien Hardy and Franck Poupeau, 'Water from the Heights, Water from the Grassroots: The Governance of Common Dynamics and Public Services in La Pas-El Alto', World Bank World Development Report Background Papers (2017), <https://openknowledge.worldbank.org/handle/10986/26097>.

- (ii) A *community* of commoners that has exclusive access to the resource in question and that defines for itself the rules to manage it in common (the subject);
- (iii) The social process of *commoning*: the concrete activity of creating and governing commons through collective action (the practice).

It is clear from this definition that commons do not solely govern community lands, which have been the topic of much research and advocacy over the last years, especially in civil society. While this contribution focuses mostly on physical lands, fisheries, forests, and other natural resources that are managed as a commons in developing countries, our definition emphasises the institutional and social dimension of self-organisation which makes the commons so different from privately or publicly owned resources: no commons without community.

3. COMMONS AND GENDER

It is unfortunate that, besides a few exceptions,¹⁸ most of the literature analyses the phenomenon of widespread commodification and dispossession of the commons in a gender-neutral way. The notion of 'commons' is also most often completely absent from Non-governmental organisation (NGO) reports about the role of women in collective land tenure systems.¹⁹ This contribution therefore seeks to reconnect both issues of commons and gender from an international legal perspective. Women are indeed disproportionately affected by the new wave of enclosure of the commons in developing countries. Women also play a crucial role in managing and sustaining the commons in developing countries. They obviously represent an important portion of the labour force (carrying water, harvesting, fishing, etc.) in the commons. As a feminist scholar has shown, not only this aspect of the productive work in the commons is often not evenly distributed along gender lines, but also the reproductive work is borne almost exclusively by women in the household.²⁰ Yet, despite their critical contribution and the wide diversity of social systems behind the commons, women still suffer from three types of systematic and persistent discriminations in their access to, ownership of, and control over the commons around the world.

The first type of barriers includes discriminatory laws at the State level, which dilute or deny women's rights to the commons.²¹ The Food and Agriculture Organization (FAO) Gender and Land Rights Database shows that women represent a significant minority in the total number

¹⁸ Anungla Aier, 'Women, Commons and Gender Justice', P2P Foundation, [http://wiki.p2pfoundation.net/Women, Commons and Gender Justice](http://wiki.p2pfoundation.net/Women,_Commons_and_Gender_Justice); Elisabetta Cangelosi and Sabin Bieri, 'Women's land rights and community land rights: conflicting or converging claims', paper presented at the XVI Biennial IASC Conference 'Practicing the commons: self-governance, cooperation, and institutional change' (2017), https://www.iasc2017.org/wp-content/uploads/2017/06/1E_Sabin-Bieri.pdf; Silvia Federici, 'Feminism and the Politics of the Commons', in David Bollier and Silke Helfrich (eds.), *The Wealth of the Commons: A World Beyond Market & State* (Amherst, MA: Levellers Press, 2012), 45-54.

¹⁹ See, e.g., Renée Giovarelli, Amanda Richardson and Elisa Scalise, *Gender & Collectively Held Land: Good Practices & Lessons Learned from Six Global Case Studies*, Landesa & Resource Equity (2016), <http://zmpdpd2maggwg34rgsm60dldr9-wpengine.netdna-ssl.com/wp-content/uploads/2016-Best-Practices-Synthesis-Report.pdf>; Rights and Resources Initiative, *Power and Potential: A Comparative Analysis of National Laws and Regulations Concerning Women's Rights to Community Forests* (2017), http://rightsandresources.org/wp-content/uploads/2017/07/Power-and-Potential-A-Comparative-Analysis-of-National-Laws-and-Regulations-Concerning-Womens-Rights-to-Community-Forests_May-2017_RRI-1.pdf.

²⁰ Federici, *Feminism and the Politics of the Commons*. See also Martin Deleixhe, 'Conflicts in common(s)? Radical democracy and the governance of the commons', *Thesis Eleven* 144, no. 1 (2018), 74.

²¹ Food and Agriculture Organization of the United Nations (FAO), *The State of Food and Agriculture 2010-11. Women in Agriculture. Closing the gender gap for development*, (2011), 23, <http://www.fao.org/docrep/013/i2050e/i2050e.pdf>.

of agricultural holders across the world – in some countries such as Algeria, Bangladesh, Jordan, or Mali, women even represent less than 5%.²² For instance, women may be legally unable to acquire rights to lands or other natural resources through markets, inheritance, transfer, or gift.²³ Women may become legally unable to do so when they marry or divorce.²⁴ Women may have inferior rights – e.g. the right to cultivate, but not to alienate. Such rights are often ‘derived from and subordinated to those of their husbands, fathers, brothers, even sons’.²⁵ There is also a risk that in securing land tenure for communities, women’s titles to community lands are not documented.²⁶ Land titling programmes and agrarian reforms may fail to formalise women’s rights, for example in registering land only in men’s names or in compensating loss of land based only on men’s activities.²⁷ Individual land titling as public intervention then becomes completely counterproductive as it can, as the World Bank’s World Development Report 2008 already warned, ‘weaken or leave out communal, secondary or women’s rights’.²⁸ Codification into law of other customary practices and traditions concerning the access or management of commons may be disadvantageous to women, too.

Second, growing market pressures on land and other natural resources further undermine women’s role in the commons in developing countries. We already know that the current global ‘land rush’ is threatening millions of often unrecognised, indigenous or customary land rights. The boom in large-scale land acquisitions by foreign investors in developing countries was triggered by the oil, food supply, and financial crises of 2008, and has led to a new wave of enclosure of the commons in the Global South.²⁹ The specific situation of women has rarely been taken into consideration in studies on land grabs. Yet, as the United Nations (UN) Special Rapporteur on the Rights of Indigenous Peoples noted, ‘land appropriation is not gender-neutral’ as it leads women to ‘lose their traditional livelihoods, such as food gathering, agricultural production, herding’.³⁰ For example, as a recent Oxfam report illustrates, when all the village’s mangrove forests were occupied by shrimp farms owned by just one investor, ‘women were hit hardest, as they were most reliant on common resources’.³¹ The Committee on the Elimination of Discrimination against Women (CEDAW Committee) similarly observed that the increased and large-scale land acquisitions by private investors ‘have put rural women at risk of forced eviction and increased poverty and have further diminished their access to and control over land, territories and natural resources, such as water, fuelwood and medicinal

²² See FAO, ‘Gender and Land Rights Database’ (2010) <http://www.fao.org/gender-landrights-database/background/en/> (accessed 25 October 2017).

²³ Renée Giovarelli, ‘Overcoming Gender Biases in Established and Transitional Property Rights Systems’, in John W. Bruce, Renée Giovarelli, Leonard Jr. Rolfes, David Bledsoe and Robert Mitchell, *Land Law Reform: Achieving Development Policy Objectives*, Law, Justice, and Development, World Bank (2006), 67-68, <https://openknowledge.worldbank.org/handle/10986/7198>.

²⁴ Ibid., 68.

²⁵ Olivier De Schutter and Katharina Pistor, ‘Introduction: Toward Voice and Reflexivity’ in Katharina Pistor and Olivier De Schutter (eds.), *Governing Access to Essential Resources* (New York, NY: Columbia University Press, 2016), 9.

²⁶ Giovarelli, Richardson and Scalise, *Gender & Collectively Held Land*, 1.

²⁷ Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General recommendation No. 34 (2016) on the rights of rural women*, CEDAW/C/GC/34 (2016), para. 77, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_7933_E.pdf.

²⁸ World Bank, *World Development Report 2008: Agriculture for Development* (Washington, DC: The World Bank, 2007), 139.

²⁹ See Liz Alden Wily, *The Tragedy of Public Lands: The fact of the commons under global commercial pressure*, International Land Coalition (2011), http://www.landcoalition.org/sites/default/files/documents/resources/WILY_Commons_web_11.03.11.pdf.

³⁰ Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples*, Victoria Tauli Corpuz, A/HRC/30/41 (2015), para. 16, <http://undocs.org/A/HRC/30/41>.

³¹ Oxfam, *Common Ground*, 30.

plants'.³² Expulsion and forced displacement then often bring secondary effects, such as gender-based violence.

Third, external pressures are not the only causes of discrimination against women. Despite being the main contributors to and the most dependent on shared resources, women's position is often weakened by their subordinate status and by formal or informal discriminatory gender norms and cultural attitudes within the community itself. While the specific term of the 'commons' is rarely explicitly mentioned in literature, there is now evidence that women are generally more likely to be excluded from leadership and decision-making positions in 'community-level discussions', 'in rural extension and water, forestry or fishery services, in cooperatives and in community or elders' councils' which often govern commons in rural areas.³³ A report of the International Land Coalition (ILC) on 41 case studies on common property regimes shows that women's participation in decisions concerning land and collectively managed natural resources remains a concern.³⁴ In the Naga tribes in the North Eastern part of India, for example, a case study indicates that whereas 'women are the "true managers" of the resources – they are the tillers, gatherers, seeders and harvesters of the land', 'they have no right to own, sell and inherit any portion of the land they tend'.³⁵ In forest communities, another report recalls that whereas 'women generate more than half of their income from forests, compared with one-third for men', 'their role and rights are rarely recognized; their voices too often go unheard when a decision is made'.³⁶ A case study developed by custodians of the tradition in Cameroon similarly acknowledges that 'the starting point of injustices in management of the commons often lies with the Traditional Rulers' responsibilities as commons managers, including the exclusion of women'.³⁷ Gender roles may also be very different in the transmission of traditional knowledge about the management of crops and preservation of seeds, which can be 'hegemonistically patriarchal' in certain indigenous and rural communities.³⁸ Globally, despite the major contribution of women to agricultural labour and food production, customary land tenure and other commons-based systems – which women rely on as their primary source of livelihood – are still largely controlled by men.³⁹

In light of the above, gender represents a challenging parameter in the legal study of the commons. Indeed, there is an obvious tension between the commoners' right to self-organisation, and the legitimate demand that States and development agencies remove barriers to women's participation in decision-making structures of the commons and ensure

³² Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General recommendation No. 34 (2016) on the rights of rural women*, CEDAW/C/GC/34 (2016), para. 61, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_7933_E.pdf.

³³ CEDAW Committee, *General recommendation No. 34*, para. 53.

³⁴ Andrew Fuys, Esther Mwangi and Stephan Dohrn, *Securing Common Property Regimes in a Globalizing World. Synthesis of 41 Case Studies on Common Property Regimes from Asia, Africa, Europe and Latin America*, International Land Coalition (2008), 29, http://www.landcoalition.org/sites/default/files/documents/resources/ilc_securing_common_property_regimes_e.pdf.

³⁵ Aier, 'Women, Commons and Gender Justice'.

³⁶ Oxfam, *Common Ground*, 33.

³⁷ Food and Agriculture Organization of the United Nations, *Governing Tenure Rights to Commons: A guide to support the implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Governance of Tenure Technical Guide No. 8 (Rome: FAO, 2016), 43.

³⁸ Aier, 'Women, Commons and Gender Justice'.

³⁹ John W. Bruce, Renée Giovarelli, Leonard Jr. Rolfes, David Bledsoe and Robert Mitchell, *Land Law Reform: Achieving Development Policy Objectives*, Law, Justice, and Development, World Bank (2006), <https://openknowledge.worldbank.org/handle/10986/7198>.

women's equal access to ownership of, and control over land, water and other natural resources. On the one hand, Ostrom's seventh design principle was precisely that '[t]he rights of appropriators to devise their own institutions [should] not [be] challenged by external governmental authorities'.⁴⁰ Yet, on the other hand, recognition of the challenges women face in the access to, management of, and control over the commons, should also constitute a priority for States and development agencies concerned with rural development, food security and women's economic empowerment. Some women's rights advocates go as far as to warn that 'any advocacy for community land tenure could result in a negative impact on women's rights, either not allowing for change or even worsening women's conditions'.⁴¹ This is clearly what makes gender so sensitive in a debate that has long been dominated by an ideal of autonomy of the commons. This dilemma between protecting and claiming collective and women's rights is of course not limited to the commons. The paradox, as the UN Special Rapporteur on the rights of indigenous peoples puts it, is that 'women's rights have often been considered divisive and external to the indigenous struggle and connected to "external values" or "Western values" that privilege individual over communal rights'.⁴² Yet, women fighting to be treated as equals in the commons, are also seeking at the same time to protect the distinct identity and practices of their community.⁴³ In our view, this is the crux of the matter: women are vulnerable not only to violations of their collective rights, as members of the commons, but also to violations of their individual rights, as sub-collectives.

Since 2015, the new universal development agenda recognises that gender equality requires an integrated approach. Acknowledging gender injustice as a defining issue of our time, the Sustainable Development Goals (SDGs) set gender equality as a comprehensive goal of its own – SDG 5. Among the 232 indicators, 54 are gender specific. So, target 1.4 calls on countries and stakeholders to 'ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources' by 2030.⁴⁴ Even though the specific term of the 'commons' is not explicitly mentioned in the Agenda, the SDGs seem broad enough to include issues related to commons-based institutions. Policies which unlock progress on women's role in the commons include 'ownership and control over land and other forms of property, inheritance, natural resources'.⁴⁵ Target 5.A seeks to '[u]ndertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws'. Specifically, the indicators for Goal 5 on gender equality include the '(a) [p]roportion of total agricultural population with ownership or secure right over agricultural land, by sex; and (b) share of women among owners or rights-bearers of agricultural land, by type of tenure', as well as the '[p]roportion of countries where the legal framework (including customary law) guarantees women's equal rights to land ownership and/or control'. Even if we now have an ambitious agenda for gender equality, it also creates

⁴⁰ Ostrom, *Governing the Commons*, 101.

⁴¹ Elisabetta Cangelosi and Sabin Bieri, 'Women's land rights and community land rights: conflicting or converging claims', paper presented at the XVI Biennial IASC Conference 'Practicing the commons: self-governance, cooperation, and institutional change' (2017), 6, https://www.iasc2017.org/wp-content/uploads/2017/06/1E_Sabin-Bieri.pdf.

⁴² *Report of the Special Rapporteur on the rights of indigenous peoples*, para. 13.

⁴³ Oxfam, *Common Ground*, 34.

⁴⁴ United Nations General Assembly Resolution, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (2015), Goal 1.4, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

⁴⁵ *Ibid.*, Goal 5.a.

challenges for communities, especially in developing countries with limited resources. That is why addressing women's rights is key to see progress on these SDGs in the commons.

4. WOMEN'S RIGHTS

Having made clear which challenges women face at the State, market and community levels, we now turn to an overview of the rights enshrined under positive international law which could affirmatively empower women in their struggle to reclaim the commons in developing countries. While legal tools and institutions recognising existing customary systems are extremely diverse at the domestic level, this section focuses on international and regional human rights instruments in order to resist gender-based discrimination and secure the commons for the benefit of all women. As we shall see, women's rights to access, control and manage the commons can indeed be found, at least implicitly, in various international and regional human rights instruments.

4.1. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Since its entry into force in 1981, the CEDAW has been the most comprehensive universal international human rights instrument for women's rights worldwide. Article 14 of the CEDAW is the only provision in an international human rights treaty specifically recognising the unique situation of rural women:

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in non-monetized sectors of the economy [...].
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
 - [...]
 - (f) To participate in all community activities;
 - (g) To have [...] equal treatment in land and agrarian reform as well as in land resettlement schemes;
 - [...].

Yet it is only in 2011 that the CEDAW Committee cohesively took the rights of rural women under the loop in a General Statement.⁴⁶ The Committee therein observed discrimination against rural women in terms of access to and control of productive resources such as land.⁴⁷ It noted that 'the lease and sale of large tracts of land to other States or to large private companies, as well as the patenting of seeds, tend to reduce the chances that women will be able to provide adequate food to themselves and their families.'⁴⁸ It underscored the importance of rural women's right to participate as 'managers of natural resources' in

⁴⁶ CEDAW Committee, *General Statement on Rural Women*, Decision 50/VI adopted on 19 October 2011 during the 50th session, A/67/38, <http://www.ohchr.org/documents/HRBodies/CEDAW/Statements/StatementRuralWomen.pdf>.

⁴⁷ Ibid., 2.

⁴⁸ Ibid., 3.

‘decision-making processes which impact on their lives including through (...) bodies of local governance’.⁴⁹

In 2016, the CEDAW Committee more specifically considered ‘rural women’s rights to land, natural resources, including water, seeds and forests, and fisheries as fundamental human rights’ in General Recommendation No. 34.⁵⁰ The Committee urged States parties to the CEDAW as well as ‘development partners’ to ‘address the negative and differential impacts of economic policies, including agricultural and general trade liberalization, privatization and the commodification of land, water and natural resources’ and enhance rural women’s role in the control over land, water, forests, fisheries, seeds and agricultural cooperative.⁵¹ Interestingly, the Committee explicitly called on States to ‘implement agricultural policies that support rural women farmers’ and ‘recognize and protect the natural *commons*’.⁵² In that regard, it noted that States parties should ‘Ensure that land acquisitions, including land lease contracts, do not violate the rights of rural women or result in forced eviction, and protect rural women from the negative impacts of the acquisition of land by national and transnational companies, development projects, extractive industries and megaprojects’.⁵³

4.2. RIGHTS OF INDIGENOUS WOMEN

Regrettably, Convention n° 169 concerning Indigenous and Tribal Peoples of the International Labour Organization (ILO) does not specifically address women’s rights⁵⁴. However, Article 22 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted on 13 September 2007 by the General Assembly, somewhat fills this void by calling on States to ensure that indigenous women enjoy full protection against all forms of violence and discrimination.⁵⁵ In this respect, the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, dedicated a report on the violations committed against indigenous women, as well as the nexus between individual women’s rights and community rights.⁵⁶ The UN Special Rapporteur recommended to UN Member States ‘to invest in the leadership capacity of women so that they can play more active roles in indigenous decision-making structures to protect women and girls within their communities’.⁵⁷ She emphasised that indigenous women’s livelihoods such as rotational agriculture, pastoralism, hunting and gathering are land-based, and therefore highly vulnerable to the phenomenon of land grabbing.⁵⁸

In this respect, UNDRIP, which is said to reflect customary international law, is the first and most comprehensive international human rights instrument to recognise collective rights to land and natural resources. The Declaration recognises the collective land tenure of indigenous communities based on customary laws. By granting indigenous peoples full rights to all the lands, territories and resources that they had traditionally owned or used, the

⁴⁹ Ibid., 4.

⁵⁰ CEDAW Committee, *General recommendation No. 34*, para. 56.

⁵¹ Ibid., paras 11 and 59.

⁵² Ibid., para. 62 (emphasis added).

⁵³ Ibid., para. 62 (c).

⁵⁴ ILO Convention n° 169 concerning Indigenous and Tribal Peoples in Independent Countries (adopted on 27 June 1989, into force since 5 September 1991).

⁵⁵ United Nations General Assembly Resolution, *United Nations Declaration on the Rights of Indigenous Peoples*, A/61/43 (2007).

⁵⁶ Report of the Special Rapporteur on the rights of indigenous peoples, para. 8.

⁵⁷ Ibid., para. 78.

⁵⁸ Ibid., para. 23.

Declaration requires States to equally recognise and protect their legal rights (Article 26(1)-(2)) as well as ensure due process (Article 27). The Declaration even acknowledges indigenous peoples' 'right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources' (Article 25). While it does not make explicit reference to the 'commons', it undoubtedly includes a form of bottom-up governance of CPRs among the protected forms of tenure. It provides that States should prevent dispossessing indigenous peoples of their lands, territories or resources (Article 8(2)). The Declaration also protects the traditional lands and shared resources of indigenous peoples 'with due respect to [their] customs, traditions and land tenure systems' (Article 26(3)). To prevent land-grabbing, the UNDRIP prohibits removing indigenous peoples by force from their lands, and requires States to consult with their own representative institutions (Article 32(2)), thus strictly imposing 'free, prior and informed consent' to give away lands (Article 10).

At the regional level, the Inter-American Court of Human Rights (IACtHR) has recognised the rights of indigenous communities to their ancestral lands, and especially the link. For example, in the *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, the IACtHR ruled after years of legal battles at the domestic level that the Sawhoyamaya had been illegally forced off their customary land, which had been taken over by a German investor for beef production. It ordered the restitution of the lands in 2006. In this case, the Court emphasised the major role of women within the community, notably to gather fruit and honey.⁵⁹ The Court recalled that 'States must devote special attention and care to protect [the pregnant women of the Community] and must adopt special measure to secure women'.⁶⁰ In 2010, another indigenous community, *Xákmok Kásek*, settled in Paraguay obtained a favourable ruling from the Court to get its ancestral land back. Again, the Court underscored the vulnerable position of women victims of land-grabbing and ruled that the State violated the right to life because it failed to take the required positive measures regarding pregnant women living in extreme poverty owing to the lack of their traditional habitat.⁶¹

4.3. RIGHTS OF PEASANT WOMEN

While indigenous land tenure may fit the main features of the commons as studied by Ostrom, commons are not always necessarily managed by indigenous communities.⁶² In a 2010 report, the former UN Special Rapporteur on the right to food recommended that, for the purpose of protecting the commons, '[t]he recognition of communal rights should extend beyond indigenous communities, at least to certain communities that entertain a similar relationship with the land, centred on the community rather than on the individual'.⁶³ In this sense, the draft UN Declaration of the Rights of Peasants and Other People Working in Rural Areas (UNDROP) now offers a window into the potential of generalising this model of community rights for *all* people involved in small-scale food production, including all those in the Global South depending on the commons for their livelihood – beyond the distinct identities, cultures and ways of life of indigenous and tribal peoples. Although the 1.2 billion

⁵⁹ IACtHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, 20 March 2006, para. 73(70).

⁶⁰ *Ibid.*, para. 177.

⁶¹ IACtHR, *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Judgment, 24 August 2010, para. 233.

⁶² IACtHR, *Case of the Saramaka People v. Suriname*, Judgment, 28 November 2007, para. 86.

⁶³ Report of the Special Rapporteur on the right to food, para. 26.

peasant farmers working in developing countries represent the primary source of food production globally, these workers disproportionately suffer from famine, systemic human rights violations and land grabbing. FIAN International, an NGO which advocates for rural workers' rights hit by the devastating effects of hunger, thus argues that 'while it is urgent to better implement existing international norms for peasants and other people living in rural areas, [it is also necessary to address] the normative gaps under international human rights law, and to elaborat[e] new legal instruments regarding the rights of peasants'.⁶⁴

Hoping to create such an instrument, the UN Intergovernmental Working Group has been drafting a Declaration. After its fourth session, which took place from 15 to 19 May 2017, a draft Declaration has been presented by the Chair-Rapporteur of the working group.⁶⁵ It is encouraging to see that the draft Declaration brings to its general discourse somewhat of a gender-conscious perspective in line with CEDAW, in particular by shedding light on the importance of peasant women's work for their communities. At the time of writing, its preamble 'stress[es] that peasant women and other rural women play a significant role in the economic survival of their families, including through their work in the non-monetized sectors of the economy, but are often denied tenure and ownership of land, equal access to land, productive resources [...]'.⁶⁶ Particular attention should be paid to the rights and special needs of women during the implementation of the Declaration (Article 2(2)).

The Declaration also devotes a specific provision to the protection of women's rights: 'States shall ensure that peasant women and other women working in rural areas enjoy without discrimination [...] [the right] [t]o have equal access to, use of and control over land and natural resources, independently of their civil and marital status and of particular tenure systems, and equal or priority treatment in land and agrarian reform and in land resettlement schemes' (Article 4(2)(h)). Regarding the commons, Article 5(1) provides that:

Peasants and other people working in rural areas have the right to have access to and to use the natural resources present in their communities that are required to enjoy adequate living conditions. They have the right to participate in the management of these resources and to enjoy the benefits of their development and conservation in their communities.

Lastly, the importance of engaging with customary authorities is consistently highlighted in the Declaration. This enables States to understand rural communities' practices and to prevent customary law from perpetuating discrimination by collaborating with them, with the end goal of ensuring the full realisation of rural women's rights. Most importantly, the draft Declaration sets forth an explicit obligation to respect the commons in Article 17(3) on the 'Right to land and other natural resources':

States shall provide legal recognition for land tenure rights, including customary land tenure rights, not currently protected by law. All forms of tenure, including tenancy, must provide all persons with a degree of tenure security that guarantees legal protection against forced evictions.

⁶⁴ Fian International, 'Rights of peasants and other people working in rural areas', <http://www.fian.org/what-we-do/issues/peasants-rights/>.

⁶⁵ Human Rights Council Open-ended intergovernmental working group on the rights of peasants and other people working in rural areas, 'Draft declaration on the rights of peasants and other people working in rural areas presented by the Chair-Rapporteur of the working group', Fourth session, 15-19 May 2017, A/HRC/WG.15/4/2, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/051/60/PDF/G1705160.pdf?OpenElement>.

⁶⁶ Ibid, preamble, para. 9.

States shall recognize and protect the natural *commons* and their related systems of collective use and management.⁶⁷

If adopted by the UN General Assembly, this would be the first international human rights instrument to give due recognition to the commons as a collective institution of its own for the management of natural resources. This Declaration therefore has the potential of giving a voice to disempowered women who suffer from discrimination in their access to and management of the commons. It is furthermore a powerful instrument to which civil society organisations could turn when governments do not adequately address rural women's needs in relation to the management of commons and other natural resources. This document could thus serve as a springboard for the creation of stakeholder groups and networks, which would ideally have the support – and involvement – of women of the community.

4.4. VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) were unanimously adopted by the Committee on World Food Security (CFS) on 11 May 2012 after a multi-stakeholder process including all UN agencies concerning nutrition (FAO, the International Fund for Agricultural Development (IFAD) and the World Food Programme (WFP)) as well as NGOs and private sector actors. Although the Guidelines are a 'soft law' instrument, these standards are strongly rooted in existing international human rights law. They were subsequently endorsed by the CEDAW Committee in General Recommendation No. 34⁶⁸ and included in the aforementioned UNDROP. The VGGT acknowledge indigenous and rural people's dependence on the commons for their basic well-being and as such see them as a vital component of realising their right to food.

Thus, paragraph 8.3, which has strongly inspired the phrasing of Article 17(3) of the draft Declaration on the Rights of Peasants, requires States to recognize and protect the '*commons*' as 'publicly-owned land, fisheries and forests that are collectively used and managed'.⁶⁹ What's more, the VGGT also advocate for equal access of women to the commons (§ 9.2):

Indigenous peoples and other communities with customary tenure systems that exercise self-governance of land, fisheries and forests should promote and provide equitable, secure and sustainable rights to those resources, with special attention to the provision of equitable access for women. Effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems. Where necessary, communities should be assisted to increase the capacity of their members to participate fully in decision-making and governance of their tenure systems.

Gender equality, in fact, stands as one of the ten guiding principles of implementation of responsible tenure governance (Guideline 3B.4). This concern for equal access of men and women to natural resources is also expressly recalled with regard to marital status and inheritance (Guideline 4.6), land redistributive reforms (Guideline 15.3), registration

⁶⁷ Emphasis added.

⁶⁸ CEDAW Committee, *General recommendation No. 34*, para. 36 (a).

⁶⁹ Emphasis added.

mechanisms of tenure rights (Guideline 17.3), and dispute resolution services (Guideline 21.1). Noteworthy regarding the aforementioned debate about reconciling community and individual rights is that the Guidelines definitely give priority to women's rights over customary rules: 'Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems' (Guideline 9.6). This choice is in line with existing international human rights law like UNDRIP.

In order to support the implementation of the VGGT, the FAO prepared a series of technical guides, among which a first volume in 2013 on '*Governing land for women and men*'⁷⁰ and another publication in 2016 entitled '*Governing Tenure Rights to Commons*'.⁷¹ The first guide does not refer to the specific notion of 'commons' but seeks to achieve gender-equitable governance in 'customary land administration institutions'. The other guide does define the 'commons' as natural resources such as land, fisheries and forests, which are used and managed collectively by 'a group of people (often understood as "community")'.⁷² Interestingly, like the Guidelines, this document extensively refers to international human rights treaties and declarations.⁷³ From the start, it states that '[s]ecure tenure rights to commons are crucial for *women* and men' and that '[t]he Guidelines represent a historic opportunity to guide governments and hold them accountable in assuming their duties and fulfilling their obligations to implement secure tenure for the legitimate holders of rights to commons'.⁷⁴ This does not necessarily mean that land titling should be promoted. In 2008, the World Bank warned that individual titling 'can weaken or leave out communal, secondary, or women's rights'.⁷⁵ In particular, from a women's rights perspective, land titling measures might produce further insecurity if land is not registered under women's names or under joint titles. The risk of gender discrimination is furthermore greater given that titling can formalize land grabbing by influential members of the private and public sector, often unaware of women's rights or unwilling to respect them. To ensure protection in an inclusive, fair and effective way, local authorities must engage with land users and recognise customary tenure of the commons. Only then should the formal process of titling begin, by taking into consideration the broad diversity of the owners, history and governance of the lands, and giving importance to women. This involves disseminating information throughout the entire community to raise awareness of the fragility of women's rights, as well as establishing a process and grievance system which women would have access to, should their rights be violated in the process of titling⁷⁶.

In this regard, while the FAO technical guide devolves the authority and responsibility to govern the commons to community institutions, it also recalls that the rights of self-governance are bound to women's rights standards.⁷⁷ Given the regular power inequalities within communities, it gives a strong emphasis on women empowerment and external (financial) support to women's participation – like for other marginalized and vulnerable people within a community.⁷⁸ As in other treaties and statements, the Voluntary Guidelines highlight the

⁷⁰ Food and Agriculture Organization of the United Nations, *Governing land for women and men: A technical guide to support the achievement of responsible gender-equitable governance of land tenure*, Governance of Tenure Technical Guide No. 1 (Rome: FAO, 2013).

⁷¹ FAO, *Governing Tenure Rights to Commons*.

⁷² FAO, *Governing land for women and men*, 57.

⁷³ FAO, *Governing Tenure Rights to Commons*, 13.

⁷⁴ *Ibid.*, p. v (emphasis added).

⁷⁵ The World Bank, World Development Report, 'Agriculture for development', (2008), 139.

⁷⁶ *Ibid.*, 139.

⁷⁷ *Ibid.*, 30, 46.

⁷⁸ *Ibid.*, 45.

importance of community organizing and political representation, specifically for women and other vulnerable members of the community. Rules regulating the composition and authority of each representative body should be established, and tools such as quotas or rules requiring a proportionate number of women could be used to improve leadership structures.⁷⁹ Women should furthermore be encouraged to participate in the mapping process, which defines the boundaries of commons. Women could provide significant input to spatial plans given their role in managing community-based lands and natural resources. In this respect, civil society organisations could act as intermediaries by facilitating negotiation processes and giving women and vulnerable people more opportunities to represent their interests.⁸⁰

4.5. BUSINESS AND HUMAN RIGHTS

The United Nations Guiding Principles on Business and Human Rights (UNGP), rooted namely in the International Bill of Human Rights, constitute a voluntary legal framework that do not create new obligations per se, but rather seek to enforce existing international human rights including those consistent with the CEDAW.⁸¹ In this respect, they are aligned with the VGGT, which also address the private sector's responsibility to respect human rights in Guideline 3.2. The Guiding Principles are founded on three pillars: States' obligation to protect, businesses' responsibility to respect, and victims' right to remedy. Regarding the second pillar, the Office of the United Nations High Commissioner for Human Rights stressed that businesses which may have adverse impacts on the human rights of people belonging to vulnerable groups shall also consider additional standards specific to these groups. In the case of the commons, this involves women's rights, especially the rights of indigenous, rural and peasant women.⁸² In this respect, the CEDAW as well as other legal instruments created by the UN shall serve as a baseline for identifying rights.

In particular, Guiding Principle 13 requires that companies '[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur'.⁸³ In addition, business enterprises must '[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.⁸⁴ This is particularly important if commons are seized or exploited by transnational corporations. As seen above, commons are increasingly commodified, women's rights – especially the rights of vulnerable women – are often negatively impacted by companies' activities or their relationships with other parties, including their supply chains.

For example, the World Bank reported that people were unjustly displaced in Indonesia and Papua New Guinea due to palm oil production.⁸⁵ Similarly, Oxfam exposed how the supply

⁷⁹ Ibid, 26.

⁸⁰ Ibid, 33.

⁸¹ United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights' (2011), Principle 12, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁸² Ibid, 14.

⁸³ Ibid, Guiding Principle 13(a)

⁸⁴ Ibid, Guiding Principle 13(b)

⁸⁵ World Bank, *Papua New Guinea: Smallholder Agriculture Development*, (2009), <http://www.worldbank.org/projects/P079140/png-smallholder-agriculture-development?lang=en>

chains of the world's biggest food and beverage companies negatively affected land rights.⁸⁶ Another study reported that two-thirds of all agricultural land investment in developing countries between 2000 and 2010 occurred in regions with drastic hunger, although 60% of the food production was allegedly intended for exports.⁸⁷ In this last example, people's fundamental right to food crosses paths with companies' business practices.

Corporations should therefore take steps to improve their impact on communities and the environment. Finding sustainable solutions for such issues, however, cannot be achieved without solid collaboration with local experts and civil society organisations; in this respect, it can be highly beneficial to map vulnerable groups and customary rights, with special focus on women's rights as exposed in the CEDAW (Guiding Principles 15, 17 and 21). Coca Cola, for example, conducted a sugar study on women and land rights in collaboration with prominent NGOs and local organisations⁸⁸. This study, published in 2016, confirmed that land rights are further threatened by local and institutional issues such as weak legislation, corruption and armed conflict. Moreover, an audit showed that only 22 percent of suppliers have committed to respecting land rights in a written policy. Regrettably, this study looked at land rights through a private property lens only, failing to consider commons and communal governance.

In any case, the Guiding Principles require that businesses assess whether and to what extent their activities risk adversely impacting stakeholders.⁸⁹ A human rights impact assessment can indeed help prevent and mitigate violations, especially if conducted with transparency and community engagement. Attention should of course be given to consulting with women who govern or had governed the commons in the past, as they are the primary exploiters of communal resources and thus the most affected by their commodification. Yet assessment teams analysing land rights risks can only prevent infringing on community land rights if they have thorough knowledge of the local land rights context, if they actively engage with affected communities and if they focus on locations with high risks of salient human rights violations⁹⁰. Once the consultation process is completed, companies are encouraged to publicly disclose both the methodology used and the results obtained. The report should highlight how women are affected, as consistent with Article 14 of the CEDAW. This needs to be done in a language and means that is accessible to the most vulnerable of community members so that all stakeholders can respond.

In parallel, the Guiding Principles urge companies to commit to respecting human rights through written policies⁹¹. Regarding the privatization of commons, business enterprises should prohibit land-grabbing practices by including specific provisions into their codes of

⁸⁶ Oxfam, *Sugar Rush; Land rights and the supply chains of the biggest food and beverage companies*, 2 October, 2013, https://www.oxfam.org/sites/www.oxfam.org/files/bn-sugar-rush-land-supply-chains-food-beverage-companies-021013-en_1.pdf.

⁸⁷ Ward Anseeuw et al, *Transnational Land Deals for Agriculture in the Global South. Analytical Report based on the Land Matrix Database*, CDE/CIRAD/GIGA, Bern/Montpellier/Hamburg, (2012), <http://landportal.info/landmatrix/media/img/analytical-report.pdf>.

⁸⁸ The Coca Cola Company, *Coca Cola Human Rights Report 2016-2017*, <http://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/human-and-workplace-rights/Human-Rights-Report-2016-2017-TCCC.pdf>, 34–36.

⁸⁹ United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights', Guiding Principle 18(b). See also *World Bank Operational Manual on Involuntary Resettlement and the UN Human Rights Council general comment No. 4 and No. 7 (on the CESCR)*.

⁹⁰ Chloe Christmas, 'How are Coca-Cola and PepsiCo stacking up on land rights?', *Oxfam America, The Politics of Poverty*, 20 October, 2016, <https://politicsofpoverty.oxfamamerica.org/2016/10/how-are-coca-cola-and-pepsico-stacking-up-on-land-rights/>.

⁹¹ United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights', Guiding Principle 16.

conduct and supplier requirements. In this respect, multinational companies in the sugar industry, such as Coca-Cola, Pepsico and Illovo Group⁹² have adopted a zero-tolerance approach to land grabs within their operations and supply chains. And yet, as private sector actors have a responsibility to respect all human rights, they shall aim to both respect *women's rights* and protect the *commons* during their business activities. In its 'Responsible Land Acquisition (and Free, Prior, and Informed Consent) Guidance' of 2017, Coca Cola admitted that effective consultation can only be achieved by including women and identifying *community* customs.⁹³

Once companies assess their impact, they shall actively monitor their business and engage in ongoing due diligence efforts to avoid adverse impacts on women's rights and communal governance. Regular consultations with the women who use and manage commonly-owned natural resources should continue throughout the entire due diligence process, as well as reviews of land tenure rights and land-related conflicts (Guiding Principles 17-21). Companies should always make their investment decision based on the human rights impact assessment, with should include a special focus on women's tenure rights. Finally, companies should continue monitoring and assessing their impacts on women's rights and commons on a regular basis. Women's rights are human rights; the Guiding Principles thus command corporations to continuously conduct due diligence on any impact they may have on women's right to govern commons. Several States have even developed, or are in the process of developing, national legislation requiring human rights due diligence⁹⁴, although they have yet to mention the commons and the right to communal governance specifically.

Overall, companies are expected to respect women's rights and prevent adverse impacts beyond what is strictly required by international standards and national legislations – especially when they operate in countries with low human rights standards.⁹⁵ Promoting women's rights within companies' global supply chains and host countries is essential.⁹⁶ In the case of the commons, corporations should ensure that investments in land and natural resources do not disadvantage women. In its 'Behind the Brands' campaign, for example, Oxfam shed light on the exploitation of women in farms, recurrent land grabbing and inadequate pay of women.⁹⁷ Recognising that vulnerable people are disproportionately

⁹² See Illovo Group, 'Guidelines on Land and Land Rights', <https://www.illovosugarafrica.com/Group-Governance/Group-Guidelines-on-Land-and-Land-Rights> (accessed 12 March, 2018).

⁹³ The Coca Cola Company, 'Responsible Land Acquisition (and Free, Prior, and Informed Consent) Guidance', Version 1.0, July 2017, <http://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/our-company/Responsible-Land-Aquisition-Guidance-2017.pdf>, 8 –9.

⁹⁴ See 'LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074, 28 March, 2017, <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte> (accessed on March 12, 2018); See Modern Slavery Act, 2015, http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf (accessed on 12 March, 2018); Swiss Federal Council, 'Initiative populaire "Entreprises responsables" : le Conseil fédéral reconnaît le bien-fondé de l'objectif mais choisit une autre voie', 15 September, 2017, <https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-68134.html> (accessed on 12 March, 2018); Parliament of Australia, 'Inquiry Into Establishing a Modern Slavery Act in Australia', <https://www.aph.gov.au/modernslavery> (accessed on 12 March, 2018); Business & Human Rights Resource Centre, 'Dutch Companies issue open letter in support of child labour regulation', <https://business-humanrights.org/en/dutch-companies-issue-open-letter-in-support-of-child-labour-regulation> (accessed on 12 March, 2018).

⁹⁵ United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights', Guiding Principle 12.

⁹⁶ Ibid, Guiding Principle 13.

⁹⁷ Beth Hoffman, 'Behind the Brands: Food justice and the 'Big 10' food and beverage companies', *Oxfam Policy & Practice*, 26 February, 2013, <http://policy-practice.oxfam.org.uk/publications/behind-the-brands-food-justice-and-the-big-10-food-and-beverage-companies-270393>.

affected, the UNGP encourage corporations to create strong human rights policies, implementation processes and grievance mechanisms. As such, businesses should provide remedies against community tenure violations both within their own operations and their supply chains (Guiding Principle 31), making sure that such remedies be accessible to women. As drivers of business development, private sector actors bear the responsibility to enforce the UNGP in their codes of conduct and those of their suppliers.

Striving to regulate transnational companies' practices within the international human rights framework, the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights is currently in the process of drafting a binding treaty on business and human rights.⁹⁸ Focusing on access to justice and effective remedy, the importance of inherent diversity among right holders has been highlighted, and a warning against the marginalization of some vulnerable groups has been made. To ensure that all women, including peasant and rural workers, have access to effective remedies, a 'gender lens' should be adopted while drafting the binding treaty, in line with the Working Group's recent thematic project⁹⁹ and CEDAW.

In light of the above, we believe that the enclosure of the commons and its adverse impacts on women is a clear example of such threats and must be considered by the Intergovernmental Working Group in its work. While voluntary guidelines represent a step in the right direction towards empowering half of the world's population and challenging patriarchal regimes, they lack enforcement. Positive change can only be achieved with the private sector's full commitment. And although some companies are increasingly working with diverse stakeholders to protect women's rights and communal governance, many others are still reluctant to engage in such processes. Corporations' responsibility to respect women's rights when engaging with commons can no longer be considered 'voluntary'; they must be thoroughly regulated and rights must be effectively acknowledged throughout the treaty.

5. CONCLUSION

This contribution sought to address a sensitive and real problem that has been ignored for too long: the commons, which are sometimes idealised in the contemporary political discourse as temples of democracy and self-government, may in fact exclude women from the collective management of resources upon which they depend.¹⁰⁰ Despite the regular patterns of violations against women at the State, market and community level, the commons and development literature have given too little attention to this issue. Likewise, the intersection between the enclosure of the commons in the Global South and the vulnerability of women has hardly ever been explored. As a commons activist advocates, it is 'crucial that the discourse on the commons engage with issues of gender justice'.¹⁰¹ As another commons

⁹⁸ United Nations Human Rights Office of the High Commissioner, 'Statement by Mr. Surya Deva, Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises - 3rd Session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', 25 October 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22303&LangID=E>.

⁹⁹ United Nations Human Rights Office of the High Commissioner, 'Applying a Gender Lens to the Guiding Principles on Business and Human Rights', <http://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx> (accessed on 12 March, 2018).

¹⁰⁰ Deleixhe, 'Conflicts in common(s)?'.

¹⁰¹ Aier, 'Women, Commons and Gender Justice'.

scholar wrote, 'Reproduction precedes social production. Touch the women, touch the rock.'¹⁰² The struggle for the autonomy of the commons cannot hide the fact, as Silvia Federici has shown, that 'as the primary subjects of reproductive work, [...] women have depended on access to communal natural resources more than men and have been most penalized by their privatization and most committed to their defense.'¹⁰³ The autonomy of the commons cannot be understood exclusively in opposition against women's rights – and *vice versa*. The alleged division along gender lines between 'legitimate', 'internal', 'community', values of the organic group, on the one hand, and 'divisive', 'external', 'individual', women's rights, on the other, is not only artificial; it is a sterile debate which brings no real solution to anyone. The problem is the patriarchal system. For there cannot be any long-lasting and sustainable commons without the contribution of women. Therefore, if we want to be true to the slogan 'no commons without community', we must also acknowledge, as a matter of international human rights law, that there cannot be any community excluding its main driving and working force – women – from its governance.

However, although recognising the threats to, and discriminations against women within commons is certainly important, more impact can happen when State authorities enforce legally binding instruments. The purpose of this contribution was therefore to take a gender-based approach to the human rights protection of the commons in developing countries. This contribution indicated at least three levels where women should see their rights recognised and applied. First, States have the responsibility to enact effective legislation on land tenure and management of other natural resources that is consistent with the CEDAW. They shall endeavour to systematically protect right holders by providing additional support to vulnerable people such as women, and hold perpetrators of violations accountable. Second, businesses, which are often the driving force behind the phenomenon of enclosure, have an important role to play in advancing women's rights related to commons. To eliminate discriminations against women and other human rights violations, for example in the form of land grabs, companies must ensure that their practices, as well as those of their suppliers, comply with the CEDAW, the UNGP and other relevant legal frameworks. Last but not least, each community represents a crucial force in advancing gender justice. It is not enough to call for the recognition of women's rights at the State level; empowering women within communities themselves and enabling them to be leaders is the key to 'sustainable' development – in the strict sense. Likewise, it is equally important that women's rights activists recognise the central place of the commons in many communities in developing countries. The key is to advance both respect for the self-determination of communities and 'gender equity as a shared social norm'.¹⁰⁴ One cannot have one without the other. This contribution therefore makes the case for the explicit recognition of a self-standing right of women to the commons in international human rights law; further research is now needed to clarify the contours and content of this emerging right, and implement it more specifically in the context of development with a gender-conscious approach.

¹⁰² Peter Linebaugh, *The Magna Carta Manifesto: Liberty and Commons for All* (Berkeley, CA: University of California Press), 244.

¹⁰³ Federici, *Feminism and the Politics of the Commons*, 48.

¹⁰⁴ Manase Kudzai Chiweshe, 'Do Traditional Institutions Matter in Participatory Essential Resource Governance Systems in Zimbabwe' in Katharina Pistor and Olivier De Schutter (eds.), *Governing Access to Essential Resources* (New York, NY: Columbia University Press, 2016), 324.



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